MATTHEW J. BRAINARD ET AL.

IBLA 94-404 Decided February 24, 1997

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting a mineral patent application. MTM-81346.

Affirmed on other grounds.

1. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Locatability of Mineral: Generally

The final administrative determination of the validity of unpatented mining claims, including those located on national forest lands, will be made by officials of the Department of the Interior, after notice and opportunity for a hearing, where material issues of fact are involved. A decision of BLM rejecting a patent application for mining claims located on national forest lands on the basis that the Forest Service found the claims were located for a common variety of building stone not locatable under the Mining Laws cannot be sustained on the basis cited. Although such a decision will ordinarily be set aside and remanded for initiation of a mining contest, the decision will be affirmed on other grounds when it is clear from subsequent proceedings that the claims have become abandoned and void.

APPEARANCES: Matthew J. Brainard and Ralph E. Jackson, pro sese.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Matthew J. Brainard and Ralph E. Jackson have appealed from a March 10, 1994, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting their mineral patent application, MTM-81346, with respect to the Lucky Gyppo Nos. 2 through 10 placer mining claims, M MC-9905 et al., 1/ that encompass 331.26 acres of public land within

1/ The serial numbers of the Lucky Gyppo Nos. 2 through 10 claims are as follows: M MC-9905 through M MC-9907, M MC-12146, M MC-17954, M MC-120124 through M MC-120126, and M MC-187446. They were located between May 2, 1978, and Nov. 14, 1991, and copies of the location notices were duly filed for recordation with BLM, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1994).

the Lolo National Forest in western Montana, near the Missoula River. 2/ Subsequent to the BLM decision, BLM was notified that Brainard and Jackson had earlier conveyed their interest in five of these claims, i.e., the Lucky Gyppo Nos. 2 through 6. Thus, it appears that the appellants' patent application now includes only the Lucky Gyppo Nos. 7 through 10 claims.

On July 9, 1992, as amended March 26, 1993, Brainard and Jackson filed their mineral patent application, claiming to have discovered, in the Pritchard formation underlying the subject mining claims, valuable deposits of a type of building stone. 3/ Significantly, they stated:

> [T]hese deposits are an uncommon occurrence within the Pritchard Formation; that while thin stone may occur in some quarry sites, seldom does it occur in enough quantity or [with] a high [enough] percentage yield to make it economically profitable to develop on a continuing basis. The [subject] claims contain significant volumes of this stone which has been proven marketable at a higher selling price per ton than the common variety of flagstone typically associated with the Pritchard Formation.

(Request at 2). On August 30, 1993, Brainard and Jackson paid the purchase price for the land sought. However, no final certificate has been issued.

By letter dated November 19, 1993, the U.S. Forest Service (FS), U.S. Department of Agriculture, notified BLM that its regulations at 36 CFR 228.41(c) "define[d]" the "Pritchard Formation Argillite" underlying the subject mining claims and other nearby national forest lands as a mineral material subject only to sale under the Materials Act of 1947, as

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2/ The land covered by the patent application is situated in the SE¼ NW¼, NE¼ SW¼, S½ SE¼, NW¼ SE¼, and lot 12 of sec. 19, T. 18 N., R. 25 W., and the SW¼ NE¼ and lots 8 and 10 of sec. 24, T. 18 N., R. 26 W., Principal Meridian, Sanders County, Montana.

3/ The claimants described the mineral as a "fine-grained quartzite/siltite," that is "thin-bedded and yields high quality building stone of very thin nature, from 5/8 inch to 1/8 inch in thickness," which had been successfully marketed from 1985 through 1991 ("Request for Patent" (Request) at 1-2). Elsewhere, they describe it as an "argillaceous siltstone" ("Economic Analysis of the Lucky Gyppo Mine From 1985 through 1992" (Economic Analysis), dated Feb. 7, 1992, at 6). See also "Geologic Evaluation - Lucky Gyppo Building Stone Placer Claims" (Geologic Evaluation), dated Sept. 29, 1984, at 1-2. Argillite has been defined as follows: "A rock derived either from siltstone, claystone, or shale, that has undergone a somewhat higher degree of induration [or hardening] than exists in those rocks. [It] is intermediate between the rocks named and slate. Its cleavage is approximately parallel to its bedding, thereby differing from slate" (U.S. Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 51 (1968)).

amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations (36 CFR Part 228, Subpart C) (Letter to State Director, Montana, BLM, from Regional Forester, Region 1, FS, dated Nov. 19, 1993). Based on this, FS requested BLM to reject the mineral patent application. BLM did so in its March 1994 decision, noting that administration of the Materials Act of 1947 and its implementing regulations on national forest lands is vested "solely" in FS (Decision at 2). Brainard and Jackson timely appealed therefrom.

Section 1 of the Materials Act of 1947, chapter 406, 61 Stat. 681 (codified at 30 U.S.C. § 601 (1994)), authorized the Secretary of Interior, "under such rules and regulations as he may prescribe, [to] dispose of mineral materials including * * * stone" found on public lands, if disposal was not otherwise expressly authorized by law (including the General Mining Laws of the United States). 4/ Further, section 1 of the Materials Act of 1947 provided that such materials were to be disposed of "only in accordance with the provisions of [the Materials Act of 1947]." 61 Stat. 681 (1947). The Act was later amended by section 1 of the Multiple Use Mining Act of 1955, P.L. 167, 69 Stat. 367, to define such materials to include "common varieties of * * * stone." See 30 U.S.C. § 601 (1994); 36 CFR 228.41(c). In addition, section 3 of the Multiple Use Mining Act of 1955, P.L. 167, 69 Stat. 368 (codified at 30 U.S.C. § 611 (1994)), provided that no deposit of "common varieties of * * * stone" can be deemed a valuable mineral deposit for purposes of validating a mining claim. 5/

Accordingly, it has long been held that deposits of common varieties of stone are not subject to location under the General Mining Laws, as amended, 30 U.S.C. §§ 21-54 (1994), and ultimately may not support a mineral patent application. See, e.g., United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991); United States v. California Soylaid Products, Inc., 5 IBLA 179 (1972). Rather, such materials are subject to disposal only under the Materials Act of 1947. See 30 U.S.C. § 601 (1994); e.g., United States v. Multiple Use, Inc., supra at 76A. However, deposits of "common varieties" do not include deposits of materials "which are valuable because the deposit has some property giving it distinct and special value." 6/ 30 U.S.C. § 611 (1994). Therefore, deposits of uncommon varieties of stone are subject to location under the General Mining Laws, and ultimately may support a patent application. See United States v.

4/ In the case of national forest lands, this authority was later transferred to the Secretary of Agriculture. See 69 Stat. 367 (1955). The applicable regulations are set forth at 36 CFR Part 228, Subpart C.

5/ This includes common varieties of building stone. See United States v. Coleman, 390 U.S. 599, 605 (1968).

6/ The definitive standard for distinguishing a deposit of an uncommon variety of stone under 30 U.S.C. § 611 (1994) was set forth by the circuit court in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). In essence, the court held that a deposit will be held to contain

Pope, 25 IBLA 199 (1976); United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974). 7/

In the present case, FS noted that the "Pritchard Formation Argillite" underlying the subject claims and other nearby national forest lands was being "used primarily for flagstone and other nonstructural components in floors, walls, fireplaces, and the like" (Letter to State Director from Regional Forester, dated Nov. 19, 1993). It, therefore, concluded that its "regulations at 36 CFR 228.41(c) clearly define this stone as a mineral material subject to disposal by sale [under the Materials Act of 1947 and 36 CFR Part 228, Subpart C]" (Letter to State Director from Regional Forester, dated Nov. 19, 1993). 8/ FS, thus, implicitly determined that the stone was a common variety under 36 CFR 228.41(c). Further, by requesting that appellants' patent application be rejected, it also necessarily asserted that the stone was subject to disposal only under the Materials Act of 1947 and 36 CFR Part 228, Subpart C, and thus not

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fn. 6 (continued)
an uncommon variety when, in comparison with other deposits of such mineral generally, it is found to have a "unique property" that imparts to it a distinct and special value. Id. at 908. In cases where the mineral taken from the deposit is used in the same way that ordinary varieties of the mineral are used, the distinct and special value must be reflected either in a higher price for the mineral or in reduced costs to develop the deposit, thereby resulting in a greater margin of profit. See id. at 908, 909. The unique property must be intrinsic to the deposit. See United States v. Henri (On Judicial Remand), 104 IBLA 93, 99 (1994), aff'd, Henri v. Lujan, No. A90-237 (D. Ak. July 31, 1992), appeal dismissed, No. 93-35102 (9th Cir. Aug. 25, 1993).
7/ The distinction between common and uncommon varieties of stone is preserved in the FS regulations implementing the Materials Act of 1947. Thus, 36 CFR 228.41(c) provides that the regulations in 36 CFR Part 228, Subpart C, apply to mineral materials which constitute common varieties of stone. The categories of these materials listed include: "(2) Building materials. Except for minerals identified as Uncommon Varieties, this category includes, but is not limited to, minerals used as or for: * * * [F]lagstone, * * * and other nonstructural components in floors, walls, roofs, fireplaces, and the like * * *." (Emphasis in original.) Thus, under the FS regulations, uncommon varieties of stone found on national forest lands and used for building purposes would not be subject to disposal under the Materials Act of 1947 and 36 CFR Part 228, Subpart C, while common varieties of stone would be subject to such disposal. Finally, the FS regulations acknowledge that they are not applicable to the disposal of minerals "subject to the terms of the United States Mining Laws, as amended (30 U.S.C. 22 et seq.)." 36 CFR 228.41(d).
8/ Indeed, FS noted that "there are several quarries for this same stone on lands near th[e mineral patent] application currently operating under Forest Service sale permits" (Letter to State Director from Regional Forester, dated Nov. 19, 1993).

subject to location under the General Mining Laws, since the stone could not, therefore, support that application. BLM so interpreted FS's request. See Decision at 2 ("[T]he Forest Service has determined that the minerals covered by your application * * * are subject to disposal exclusively under the Materials Act of 1947, as amended." (Emphasis added.)

[1] FS's determination that the Pritchard formation argillite underlying the subject claims was a mineral material subject to disposal under the Materials Act of 1947 and 36 CFR Part 228, Subpart C, was, however, not binding on BLM for the purpose of resolving the question of whether the stone was locatable under the General Mining Laws and thus could support the patent application. The decision of BLM in this case errs in two critical respects. First, it abdicates the responsibility of BLM to determine the validity of mining claims which are the subject of a patent application. Further, it purports to defer to an FS validity determination involving issues of law and fact made without the benefit of notice and an opportunity for a hearing. It is well established that the final administrative determination of the validity of unpatented mining claims, including those located on national forest lands, will be made by the Department of the Interior, after notice and opportunity for a hearing. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450, 459-60 (1920); Rawls v. Secretary of the Interior, 460 F.2d 1200-1201 (9th Cir. 1972), cert. denied, 409 U.S. 881 (1972); United States v. Diven, 32 IBLA 361, 366 (1977); United States v. Bergdal, 74 I.D. 245, 249-50 (1967). The authorized officials of BLM plainly did not exercise that authority in the present instance. 9/ When FS has determined that the mineral claimed to have been discovered under a mining claim on national forest land is a common variety not subject to location under the General Mining Laws, but rather subject to disposal only under the Materials Act of 1947, thus requiring rejection of a

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9/ BLM made no determination of its own that the stone was a common variety of stone, and thus could not support appellants' mineral patent application. Rather, it is clear that BLM simply deferred to the FS determination under 36 CFR 228.41(c):

"The administration of the[] regulations [at 36 CFR 228.41(c)] is solely within the jurisdiction of the Secretary of Agriculture who has delegated the implementation to the Forest Service. The Regional Forester of the Forest Service has determined that the minerals covered by your [mineral patent] application meet the definition of mineral materials as defined by 36 CFR 228.41, and are subject to disposal exclusively under the Materials Act of 1947, as amended. Therefore, your mineral patent application, MTM 81346[,] is rejected."

(Decision at 2 (emphasis added)). While it may be true that FS is vested with the sole authority to administer its own regulations, the FS holding is neither sufficient to satisfy the obligation of BLM to perform its duties nor sufficient to comply with procedural due process requirements (i.e., notice and hearing) entailed in rejection of a mining claim on the ground the mineral deposit is not locatable.

mineral patent application, the proper recourse is to initiate a Government contest. See United States v. Cook, 71 IBLA 268, 273 (1983); United States v. Diven, supra at 365; United States v. Bergdal, supra at 251.

While our finding would ordinarily mandate remand of this case to commence a contest, it has come to our attention that disposition of this case is affected by events occurring after the filing of this appeal. Subsequent to the BLM decision rejecting appellants' patent application, a decision was issued by BLM on December 5, 1994, declaring the Lucky Gyppo Nos. 2 through 10 mining claims (M MC-9905 through M MC-9907, M MC-12146, M MC-17954, M MC-120124 through M MC-120126, and M MC-187446) abandoned and void for failure to file an affidavit of assessment work for the claims by December 30, 1993. On February 3, 1997, the Board issued an order affirming the latter BLM decision. Accordingly, we find that the decision rejecting the patent application must be affirmed on this ground. 10/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision appealed from is affirmed on other grounds.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge

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10/ We note that on Aug. 30, 1994, BLM issued an amended regulation at 43 CFR 3833.2-6 which states:

"Evidence of annual assessment work performed to hold a mining claim or a notice of intention to hold a mill site need not be filed on unpatented mining claims or mill sites if mineral entry under a mineral patent application has been allowed. The owner of that mining claim or mill site is exempt from the filing requirements of § 3833.2 and the payment of maintenance fees under § 3833.1-5 as of the date mineral entry is allowed."

59 FR 44862 (Aug. 30, 1994). The prior regulation, in effect in 1993, exempted the owner of an unpatented mining claim or mill site from the filing requirements of 43 CFR 3833.2 where an "application for mineral patent which complies with 43 CFR part 3860 has been filed and final certificate has been issued." In neither appeal before the Board did appellants assert compliance with 43 CFR 3833.2-6 (1993) or 43 CFR 3833.2-6 (1994). Under the circumstances, we offer no opinion regarding the applicability of either regulation.